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IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Statement of Interest of Amicus State of New York

The petitioner in the instant case is asking this Court to determine *inter alia*, (a) whether the exclusionary rule should be "modified to admit relevant, competent evidence" where the police have acted in good faith under "exigent circumstances" and application of the rule would serve no

valid purpose and (b) whether a search warrant which is deficient on its face may be cured by adducing additional evidence at the suppression hearing to show that the police in fact had probable cause to obtain the warrant. These questions are of direct and substantial interest to the Attorney General of the State of New York. As the chief legal officer of the State of New York (N.Y. Executive Law § 63), the Attorney General is concerned with maintaining an equitable balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice. In the context of the instant case, we believe that this balance is best achieved by permitting rehabilitation of the affidavit and, to this extent, limiting the application of the exclusionary rule.

ARGUMENT

The exclusionary rule is best served in search warrant cases by affording the prosecution an opportunity to show that the police in fact had probable cause to obtain a warrant.

The avowed purpose of the exclusionary rule fashioned by this Court is "to deter future unlawful police conduct." *United States* v. *Calandra,* 414 U.S. 338, 347 (1974); *Elkins* v. *United States,* 364 U.S. 206, 217 (1960). Too often, however, the rule is applied without reference to this purpose, resulting in a windfall to the criminal defendant. This is most likely to occur in cases where, as here, the evidence excluded has been obtained pursuant to a warrant issued by a neutral magistrate. In such cases, the villain of the piece—if there can truly be said to be one—is not the policeman who, in good faith, followed the injunction

of this Court to seek a warrant before conducting his search, but the judicial officer who found the affidavit in support of the warrant to be legally adequate. To paraphrase Justice Cardozo's classic statement in *People* v. *DeFore,* 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), in these cases it is not the "constable" who "blundered" but the magistrate.

The remedy for the anomaly of applying the exclusionary rule in search warrant cases like the instant one should lie in affording the prosecution an opportunity to show, if it can, that the police in fact had sufficient information available to them at the time they applied for the warrant to constitute probable cause for its issuance. This approach, which was taken by the Nebraska state courts (*State* v. *Rice,* 188 Neb. 728, 199 N.W. 2d 480 [1972]) but specifically rejected by the federal courts which invalidated respondent's conviction, would result in a more meaningful use of the exclusionary rule.

This Court has frequently stated that:

> "When the right of privacy must reasonably yield to the right of search is, as a rule to be decided by a judicial officer, not by a policeman or government enforcing agent."

Johnson v. *United States,* 333 U.S. 10, 13-14 (1948); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 449 (1971).

> "The [judicial officer] must judge for himself the persuasiveness of the facts relied upon by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion." *Giordenello* v. *United States,* 357 U.S. 480, 486 (1958).

The Magistrate is thus viewed as a neutral buffer against possible police excesses. In practice, however, the exclusionary rule is applied in search warrant cases as if the Magistrate were a passive figure, incapable of making an independent judgment as to the sufficiency of an affidavit before him. Implicit in this application of the rule is the assumption that it was the policeman who acted improperly—in most cases by providing too little information. Presumably, therefore, the rule is being applied to deter him from poor draftsmanship in the future.

It is apparent that this result is unrealistic. The policeman who has applied for a warrant has already, to this extent, been deterred. Compare *Oregon* v. *Hass*, —— U.S. ——, 43 U.S.L.W. 4417, 4420 (March 19, 1975). At this point, the responsibility properly shifts to the judicial officer before whom he appears.* Unlike the policeman who is a nonlawyer (*United States* v. *Ventresca*, 380 U.S. 102, 108 [1965]), the judicial officer may be expected to have a better understanding of what the law requires. It is for him to determine whether or not it is necessary to elicit further information before he issues a warrant. *Whiteley* v. *Warden*, 401 U.S. 560, 565, n. 8 (1971); *Aguilar* v. *Texas*, 378 U.S. 108, 109, n. 1 (1964). See also *Naples* v. *Maxwell*, 393 F. 2d 615 (6th Cir. 1968); *United States ex rel. Pugach* v. *Mancusi*, 411 F. 2d 177 (2d Cir.), *cert. denied* 396 U.S. 889 (1969); *United States ex rel. Gaugler* v. *Brierley*, 477 F. 2d 516 (3d Cir. 1973); *Campbell* v. *Minnesota*, 487 F. 2d 1 (8th Cir. 1973); *Boyer* v. *Arizona*, 455 F. 2d 804 (9th Cir. 1972), all of which hold that sworn oral testimony before a state magistrate on an application for a warrant may constitutionally supplement an affidavit which, on its face, does not establish probable cause.*

* In New York a search warrant may only be issued by "a local criminal court" (New York Criminal Procedure Law § 690.05 [1]), i.e., by a judge, justice or magistrate of a court of criminal jurisdiction.

If the judicial officer fails in this duty, it is he who has erred, not the policeman. This omission should not thereafter preclude the state from rehabilitating the affidavit by showing that the police actually had probable cause when they applied for the warrant. See opinion of Mr. Justice Clark, dissenting in *Aguilar* v. *Texas*, 378 U.S. 108, 118 (1964).

The idea of going behind the affidavit in search warrant cases is not a novel one. On the contrary, this kind of investigation is permitted in cases where the defendant claims that there was perjury or misrepresentation in the affidavit. *United States* v. *Carmichael*, 489 F. 2d 983 (7th Cir. 1973) (en banc); *United States* v. *Dunning*, 425 F. 2d 836 (2nd Cir. 1969); *United States* v. *Marihart*, 492 F. 2d 897 (8th Cir. 1974).** As the New York Court of Appeals

* Rule 41(c) of the Federal Rules of Criminal Procedure contemplates that Federal magistrates will go beyond the affidavit where necessary insofar as it provides:

> "Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit."

See Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide For Federal Magistrates," 64 J. Crim. L. 270 (1973).

Section 690.40 of the New York Criminal Procedure Law contains a similar provision.

** Significantly, the Eighth Circuit, which in the instant case refused to take into account the State court's finding that the police *in fact* had probable cause, held in the *Marihart* case that an in-

(footnote continued on following page)

pointed out in adopting a rule permitting such attack:

> "Modern thought which produced the decision in *Mapp* v. *Ohio,* (367 U.S. 643) would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured."

People v. *Alfinito,* 16 N Y 2d 181, 185, 211 N.E. 2d 644 (1965). See also *People* v. *Cameron,* 40 A D 2d 1034, 339 N.Y.S. 2d 12 (2d Dept. 1972). We believe it is no less incongruous to bar the prosecution from showing that there was probable cause for the issuance of the warrant.

The only difference between the perjury cases and the instant cases lies in who is likely to benefit if the circumstances underlying the affidavit are examined. In the perjury cases the defendant alone stands to gain and, when he does, the State necessarily loses. To the extent that the deterrence rationale of the exclusionary rule is valid, this result is justifiable. In a case like the instant one, where rehabilitation is permitted, it is the State which may benefit. If it does, the detriment to the defendant is, at worst, the denial of a windfall. This result is equally consistent with the deterrence rationale.

We know of no constitutional impediment to conferring this potential benefit on the State so long as the means by which it is done are fair. This is simply a matter of proof, just as it is in the perjury cases, or in any case involving a probable cause determination. See, e.g., *Draper* v. *United States,* 358 U.S. 307 (1959); *Brinegar* v. *United States,* 338 U.S. 160 (1949).

(footnote continued from preceding page)

nocent misrepresentation in the affidavit "even if material" would not require suppression of the evidence seized. 492 F. 2d at 900, n. 4. Ironically, the Court relied, *inter alia* on the inapplicability of the deterrence purpose of the exclusionary rule.

The limitation on the applicability of the exclusionary rule which we propose would not adversely affect the viability of the warrant requirement, as this Court appears to have assumed in *Whiteley* v. *Warden,* 401 U.S. 560, 565, n. 8 (1971). Indeed, the notion that the warrant requirement would become "meaningless" if the affidavit is subject to rehabilitation is another instance of the unwillingness, in practice, to credit the judgment of the magistrate to whom the application is made. If the magistrate properly performs his function there will be no need to rehabilitate the affidavit. On the other hand, if he is remiss and the police in fact had probable cause, then it would be exalting form over substance to exclude otherwise reliable evidence to prevent the possible dilution of the warrant requirement.

Short of abolishing the exclusionary rule or limiting the availability of habeas corpus relief in Fourth Amendment cases (See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 250-275 [1973] [Powell, J., concurring]), affording an opportunity to rehabilitate the warrant represents a most realistic accommodation of the various interests involved in the search warrant context, as the circumstances of this case illustrate. In the instant case, the trial judge allowed the police to testify at the pre-trial supression hearing as to facts within their knowledge at the time they sought the warrant but which were not incorporated in their affidavit. After hearing all the testimony the Court determined that the police had probable cause to obtain a warrant. On appeal, the Nebraska Supreme Court reviewed the entire record and held that the affidavit was sufficient on its face but that, in any event, the additional information elicited at the suppression hearing showed the existence of probable cause. *State* v. *Rice,* 188 Neb. 728, 199 N.W. 2d 480 (1972). The Court also expressly found that the police officers in this case, who were working under pressure generated by public outrage as well as by the fear of further bombings

"were doing their very best in good faith to follow the mandate of the Fourth Amendment." Id. at 488.

The findings based upon the additional evidence were not reviewed, let alone questioned by the Federal Courts which invalidated petitioner's conviction. Nor did the Courts below question the good faith efforts of the police.*

In these circumstances, rehabilitation of the affidavit has shown that the deterrence purpose of the exclusionary rule would plainly not be served by its application to exclude the dynamite and other bomb-making paraphernalia seized from petitioner's house. As this Court rightly stated in *Michigan* v. *Tucker,* 417 U.S. 433, 447 (1974):

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

At the same time, rehabilitation of the affidavit has served the "judicial integrity" rationale for the rule since

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* The District Court refused to consider the entire state court record on the ground that "the propriety of [the Magistrate's] action should be determined from what he knew, not from what someone else knew. . . ." *Rice* v. *Wolff, Jr.,* F.Supp. (D. Neb. 1974) (Petition for Certiorari, p. 61). However, this is the standard an appellate court might adopt acting in a supervisory capacity over its magistrates. It has no place on the context of federal habeas corpus review of state criminal convictions. The function of habeas corpus is not to permit federal review of specific findings made by the state courts in criminal cases, but to determine whether the conviction is fundamentally fair. This function is satisfied in a search warrant case if there was in fact probable cause to issue a warrant.

the courts have not been a party to any illegality but, rather, have been the instruments for insuring that there is no illegality. *Elkins* v. *United States,* 364 U.S. 206, 222 (1960). In addition, since there is no "contention that the search rendered the evidence unreliable or that its means cast doubt upon the [petitioner's] guilt" (*Schneckloth* v. *Bustamonte, supra,* at 258 [*Powell,* J. concurring]), rehabilitation has served society's interest in convicting the guilty by permitting introduction of the seized evidence. We believe that this interest outweighs any abstract injury to the defendant.

Finally, because it avoids the need for courts to sanction illegality at the expense of breeding public contempt for the law and also permits use of the evidence to convict the guilty, rehabilitation will foster public confidence in the law to the satisfaction of both those who favor the exclusionary rule and those who oppose it. The question of public confidence in the law is relevant in all cases but has particular significance in a case like the instant one which involved a vicious crime and which provoked great notoriety and public concern that the persons who committed it be apprehended and punished.

For the foregoing reasons we believe that a rule affording the prosecution an opportunity that it otherwise does not have to cure an error which is often insubstantial (See *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209, 219-220 [2d Cir. 1967]) and for which it is not responsible is a fair and reasonable means for avoiding the inequitable consequences which ensue from an irrelevant application of the exclusionary rule. As Justice Cardozo observed in *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934):

> "justice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament."

We, therefore, strongly urge this Court to adopt a rule permitting rehabilitation in search warrant cases.

CONCLUSION

The exclusionary rule should be held inapplicable in search warrant cases where the prosecution can show that the police in fact had probable cause to obtain a warrant.

Dated: New York, New York, August 7, 1965.

Respectfully submitted,

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